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Supreme Court, U.S.
FILED
JUN 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1569

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

RICHARD H. AUSTIN, Michigan Secretary of State, and
FRANK J. KELLEY, Michigan Attorney General,
Appellants,

v.

MICHIGAN STATE CHAMBER OF COMMERCE,
Appellee.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR COMMON CAUSE AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

32 pp

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE MICHIGAN STATE CHAMBER OF COMMERCE FALLS OUTSIDE THE *MCFL* EXCEPTION, WHICH IS LIMITED TO IDEOLOGICAL ADVOCACY CORPORATIONS THAT DO NOT CAUSE ANY OF THE HARMS GENERALLY CREATED BY CORPORATE CAMPAIGN SPENDING	4
A. The Unique Nature of Corporations Creates Compelling Interests That Justify a Prohibition of Campaign-Related Expenditures from Corporate Funds	5
B. The Chamber of Commerce Is Fundamentally Different From an Ideological Advocacy Organization	11
II. CAMPAIGN SPENDING BY CHAMBERS OF COMMERCE AND TRADE ASSOCIATIONS WOULD DRASTICALLY UNDERMINE PROHIBITIONS ON DIRECT CAMPAIGN SPENDING BY BUSINESS CORPORATIONS	15
III. TO PROTECT THE INTEGRITY OF THE ELECTORAL PROCESS, THE *MCFL* EXCEPTION MUST CONTINUE TO APPLY ONLY TO NONPROFIT CORPORATIONS THAT DO NOT RECEIVE FUNDS FROM BUSINESS CORPORATIONS	20
CONCLUSION	27

TABLE OF AUTHORITIES

CASES — Page

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 9, 22
Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10), 396 Mich. 465, 242 N.W.2d 3 (1976) 7
Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*
California Medical Association v. FEC, 453 U.S. 182 (1981) 2, 8, 26
Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986) 22
Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981) 9, 10
City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) 23
Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) 25
Common Cause v. Schmitt, 512 F. Supp. 489 (D.D.C. 1980), *aff'd by equally divided court*, 455 U.S. 129 (1982) 2
FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) ..... *passim*
FEC v. National Conservative Political Action Committee, 470 U.S. 480 (1985) ..... *passim*
FEC v. National Right to Work Committee, 459 U.S. 197 (1982) ..... *passim*
First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 5, 6, 10
NAACP v. Alabama, 357 U.S. 449 (1958) 9
Pipefitters Local Union 562 v. United States, 407 U.S. 385 (1972) 7, 14
Posadas de Puerto Rico Association v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) 23
Regan v. Taxation With Representation of Washington, 461 U.S. 540 (1983) 22
Republican National Committee v. FEC, 487 F. Supp. 280 (S.D.N.Y.), *const. qns. answered*, 616 F.2d 1 (2d Cir.) (en banc), *aff'd mem.*, 445 U.S. 955 (1980) 2

TABLE OF AUTHORITIES—Continued

Page

Retail Clerks v. Schermerhorn, 373 U.S. 746 (1963) 4, 21, 22
Roberts v. United States Jaycees, 468 U.S. 609 (1984) 23
Rosario v. Rockefeller, 410 U.S. 752 (1973) 25
United Public Workers v. Mitchell, 330 U.S. 75 (1947) 26
United States v. Ballard, 322 U.S. 78 (1944) 24
United States v. Congress of Industrial Organizations, 335 U.S. 106 (1948) 7
United States v. International Union United Automobile Workers, 352 U.S. 567 (1957) 5
United States v. O'Brien, 391 U.S. 367 (1968) 23
Ward v. Rock Against Racism, No. 88-226 (U.S. June 22, 1989) 9, 26
Wayte v. United States, 470 U.S. 598 (1985) 23

STATUTES AND LEGISLATIVE MATERIAL

2 U.S.C. § 441a (1982) 19
2 U.S.C. § 441b (1982) 4, 19
26 U.S.C. § 501(c) (6) (1982) 17, 18
Mich. Comp. Laws § 169.255 (West Supp. 1988) 19
93 Cong. Rec. 6438 (1947) 27

OTHER AUTHORITIES

Administration's Ethics Viewed as Average, Boston Globe, Mar. 30, 1989, at 16 6
By-Laws of the Michigan State Chamber of Commerce 13
Constitution of the National Association of Manufacturers of the United States of America (rev. 1985) 16
Drexel Sought Help From 9 in Congress To Pressure SEC, L.A. Times, Feb. 1, 1989, at 3, col. 1 6
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Federal Election Commission, Press Release, April 9, 1989 ..... 19, 20

TABLE OF AUTHORITIES—Continued

	Page
T. Geer, *Tax Management, Estates, Gifts, and Trusts: Exempt Organizations—Exemption Requirements* (1986)	18
In H.U.D.'s Backyard, a Cesspool, N.Y. Times, June 17, 1989, at A22, col. 1 (late ed.)	6
Kates & Zimmerman, *The Tax-Exempt Business League and Its Functions,* 8 B.C. Ind. & Comm. L. Rev. 953 (1966-67)	17
Majority in Poll Criticize Congress, Washington Post, May 26, 1989, at A8	6
D. McCloskey, *The Applied Theory of Price* (1982)	21
Michigan State Chamber of Commerce, *The State/Local Chambers of Michigan Working Together in Political Action* (1985)	13
Michigan State Chamber of Commerce, *1985-86 Michigan Directory* (1985)	13
National Trade and Professional Associations of the United States (J. Russell 24th ed. 1989)	15, 17, 18
Putting a Tighter Rein on the Pentagon's Private Consultants, Christian Science Monitor, June 12, 1989, at 1	6
R. Statham & R. Buek, *Associations and the Tax Laws* (1978)	17
Turnout Hits 44-Year Low Despite Gains in Voters, Los Angeles Times, Nov. 6, 1986, at 20	6
United States Chamber of Commerce, *1989 Annual Report*	18
United States Chamber of Commerce, *We Believe in America and the Free Enterprise System That Made It Great* (1984)	16
Vote Turnout Rate the Second Lowest of 20th Century, Boston Globe, Nov. 11, 1988, at 17	6

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Appellee.

On Appeal from the United States Court of Appeals for the Sixth Circuit

BRIEF FOR COMMON CAUSE AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

This amicus curiae brief is submitted by Common Cause in support of appellants Richard H. Austin, the Secretary of State of Michigan, and Frank J. Kelley, the Attorney General of Michigan. By letters filed with the Clerk of the Court, appellants and appellee Michigan State Chamber of Commerce have consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

Common Cause is a nonprofit, nonpartisan organization with approximately 280,000 members. One of its central purposes is to further honest and responsible government, accountable to the voters who elect it. Common Cause has participated actively in litigation seeking to protect the integrity of the electoral process. It has filed briefs as party or *amicus curiae* in several previous cases before

this Court concerning the constitutionality and implementation of the federal election laws,[1] including *FEC v. Massachusetts Citizens for Life, Inc*,[2] the decision whose application is at issue in the present case. Common Cause believes that this case raises important issues that go to the heart of legislative prohibitions on corporate spending in election campaigns.

SUMMARY OF ARGUMENT

In *FEC v. Massachusetts Citizens for Life* ("*MCFL*"),[3] this Court recognized the legitimacy of the interests served by prohibiting corporations from making independent expenditures in candidate elections. Such prohibitions prevent the unfair deployment of wealth amassed through the corporate form, which represents economic success rather than political support, and protect dissenting shareholders of corporate contributors from being forced to support political candidates whom they may in fact oppose. The Court held, however, that the federal statute prohibiting campaign expenditures by corporations was unconstitutional as applied to MCFL, an ideological group organized as a nonprofit corporation. The Court reasoned that three essential characteristics of MCFL—its express political purposes, the purely voluntary nature of its support, and its exclusive reliance on individual donations—removed any danger that its campaign spending would cause the same harms as business corporation expenditures.

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[1] *See, e.g., FEC v. National Conservative Political Action Comm.* ("*NCPAC*"), 470 U.S. 480 (1985); *Common Cause v. Schmitt*, 512 F. Supp. 489 (D.D.C. 1980) (3-judge court), *aff'd by equally divided court*, 455 U.S. 129 (1982); *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981); *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280 (S.D.N.Y.) (3-judge court), *const. qns. answered*, 616 F.2d 1 (2d Cir.) (en banc), *aff'd mem.*, 445 U.S. 955 (1980); *Buckley v. Valeo* ("*Buckley*"), 424 U.S. 1 (1976).

[2] 479 U.S. 238 (1986).

[3] *Id.*

The Sixth Circuit erred in placing the Michigan State Chamber of Commerce ("the Chamber") within the exception this Court fashioned in *MCFL*. First, unlike MCFL, the Chamber was created by business corporations and receives most of its income from these corporations. Thus, the Chamber is a conduit for "the type of direct spending that creates a threat to the political marketplace."[4] Second, the Chamber is not a purely ideological organization but also provides economic benefits for its members; consequently, its members may not intend that their contributions be used for political activities. Third, those members who disapprove of the political use of their money cannot withdraw their support without suffering an economic penalty. In each of these respects, the Chamber more closely resembles traditional business corporations than ideological advocacy organizations like MCFL.

The Chamber is difficult to distinguish from thousands of other incorporated business organizations, including trade associations and business leagues. If the Chamber is permitted to make campaign expenditures, virtually the entire incorporated trade association sector could assert the same constitutional right. Vast amounts of money from business corporations would be expended through trade association conduits for campaign purposes. As a result, legislative efforts to prevent the corrupting influence of corporate money upon the electoral process would be drastically undermined.

To safeguard the compelling interests served by prohibiting corporate campaign spending, this Court should reaffirm the circumscribed boundaries of the *MCFL* exception. Legislatures must be permitted to prohibit campaign expenditures by any nonprofit corporation that does not rely exclusively on non-corporate contributions. No less restrictive means would effectively protect the electoral process and the interests of dissenting shareholders.

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[4] *Id.* at 264.

Because money is fungible, there is no meaningful way in which a nonprofit corporation can segregate contributions from business corporations and funds originally derived from other sources.[5] The bright-line rule established in *MCFL* provides the only administrable standard of conduct for nonprofit corporations and prevents circumvention of campaign finance laws by business corporations.

ARGUMENT

I. THE MICHIGAN STATE CHAMBER OF COMMERCE FALLS OUTSIDE THE *MCFL* EXCEPTION, WHICH IS LIMITED TO IDEOLOGICAL ADVOCACY CORPORATIONS THAT DO NOT CAUSE ANY OF THE HARMS GENERALLY CREATED BY CORPORATE CAMPAIGN SPENDING.

In *FEC v. Massachusetts Citizens for Life*,[6] this Court reaffirmed the legitimate governmental interests served by prohibiting corporations from making independent expenditures in candidate elections. The Court held, however, that the federal statute prohibiting such expenditures[7] was unconstitutional as applied to MCFL, an ideological advocacy group organized as a nonprofit corporation. Three characteristics of MCFL—its express political purposes, the purely voluntary nature of its support, and its exclusive reliance on individual contributions—were "essential" to the Court's holding.

In this case, the Court of Appeals misconstrued *MCFL* by holding that electoral expenditures by the Michigan State Chamber of Commerce are constitutionally protected. The Chamber, an entity created and financed by

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[5] *See Retail Clerks v. Schermerhorn*, 373 U.S. 746, 753-54 (1963).

[6] 479 U.S. 238 (1986).

[7] 2 U.S.C. § 441b (1982).

business corporations, is fundamentally different from ideological advocacy corporations like MCFL. The Sixth Circuit's decision negates the safeguards fashioned by this Court to protect the electoral process from "political war chests funneled through the corporate form."[8]

A. The Unique Nature of Corporations Creates Compelling Interests That Justify a Prohibition of Campaign-Related Expenditures from Corporate Funds.

The history of campaign finance regulation demonstrates an unwavering legislative judgment that "the special characteristics of the corporate structure require particularly careful regulation."[9] Beginning shortly after the turn of this century, Congress and numerous state legislatures have adopted and strengthened restrictions on corporate financial activity in political campaigns.[10] Today, the federal government and at least twenty states prohibit both contributions and expenditures by corporations in connection with elections to public office, while typically permitting corporations to establish PACs financed by voluntary contributions.

In *MCFL*, this Court reaffirmed two compelling interests served by the regulation of corporate electoral activity. First, such regulation protects the integrity of the political marketplace from the unfair deployment of wealth amassed through the special advantages that accompany the corporate form.[11] As this Court recently

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[8] *MCFL*, 479 U.S. at 257 (quoting *NCPAC*, 470 U.S. at 501).

[9] *FEC v. National Right to Work Committee* ("*NRWC*"), 459 U.S. 197, 209-10 (1982); *see First National Bank of Boston v. Bellotti* ("*Bellotti*"), 435 U.S. 765, 826 (1978) (Rehnquist, J., dissenting) (characteristics of corporations, "so beneficial in the economic sphere, pose special dangers in the political sphere").

[10] For a history of such regulation, *see United States v. International Union United Automobile Workers*, 352 U.S. 567, 570-84 (1957).

[11] *See MCFL*, 479 U.S. at 259; *NCPAC*, 470 U.S. at 495; *NRWC*, 459 U.S. at 207. These advantages include "special rules relating to

declared in *MCFL*, resources in the treasury of a business corporation

> are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.[12]

Because the "corrosive influence of concentrated corporate wealth" distorts the political process,[13] there is a compelling governmental interest in ending such influence. That interest has never been more compelling. A continuing series of scandals in the federal government demonstrates the misuse of corporate money to influence government decisions,[14] and the deleterious effects of such corruption on public confidence in our governing institutions.[15]

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such matters as limited liability, perpetual life, and the accumulation, distribution, and taxation of assets." *See Bellotti*, 435 U.S. at 809 (White, J., dissenting).

[12] *MCFL*, 479 U.S. at 258.

[13] *Id.* at 257.

[14] *See In H.U.D.'s Backyard, a Cesspool*, N.Y. Times, June 17, 1989, at A22, col. 1 (late ed.) (discussing influence-peddling by real estate developers seeking HUD grants for housing projects); *Putting a Tighter Rein on the Pentagon's Private Consultants*, Christian Science Monitor, June 12, 1989, at 1 (discussing Pentagon procurement scandals and "Ill Wind" investigation); *Drexel Sought Help From 9 in Congress To Pressure SEC*, L.A. Times, Feb. 1, 1989, at 3, col. 1 (assistance obtained by investment banking firm from members of Congress to whom it had given "direct corporate gifts . . . in the form of honorariums").

[15] *Majority in Poll Criticize Congress*, Wash. Post, May 26, 1989, at A8; *Administration's Ethics Viewed as Average*, Boston Globe, Mar. 30, 1989, at 16; *Turnout Hits 44-Year Low Despite Gains in Voters*, L.A. Times, Nov. 6, 1986, at 20; *Vote Turnout Rate the Second Lowest of 20th Century*, Boston Globe, Nov. 11, 1988, at 17.

Second, in addition to preventing corruption and the appearance of corruption, regulation of the electoral activities of business corporations protects shareholders who invest for economic, rather than political, purposes. This Court has repeatedly recognized a legitimate interest in protecting dissenting shareholders from having their money used for political ends they do not support.[16]

According to the Supreme Court of Michigan, these governmental interests form the basis for the Michigan statute, first enacted in 1913, which is at issue in this case.

> The legislative intent in prohibiting financial involvement of corporations in the elective process was to prevent the use of corporate funds to impose undue influence upon elections. Large aggregations of capital controlled by a few persons could have a significant impact upon the nomination or election of a candidate. The possibility of misuse of corporate assets by persons acting on behalf of uninformed or unwilling shareholders and the attempts at influence or importunity which might be exerted upon a successfully elected candidate by a contributing corporation represent abuses which the passage of the corrupt practices act sought to eliminate.[17]

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[16] *MCFL*, 479 U.S. at 260; *NRWC*, 459 U.S. at 208. *Cf. Pipefitters Local Union 562 v. United States* ("*Pipefitters*"), 407 U.S. 385, 414-415 (1972) ("the dominant concern in requiring that contributions be voluntary was . . . to protect the dissenting stockholder or union member"); *United States v. Congress of Indus. Organizations*, 335 U.S. 106, 113 (1948) (discussing Congress' "feeling that corporate officials had no moral right to use corporate funds for contribution to political parties without the consent of the stockholders").

[17] *Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10)*, 396 Mich. 465, 242 N.W.2d 3, 13 (1976) (citations omitted) (ruling on comprehensive campaign finance law that incorporated the prohibition).

It is permissible for the Michigan legislature to focus on corporations in its promulgation of laws regulating campaign spending, even though other types of entities such as unincorporated

These compelling interests apply with equal force both to contributions and to independent expenditures by business corporations. In cases not involving such corporations, the Court has distinguished between independent expenditures and contributions, recognizing greater governmental interests in regulating the latter.[18] In *MCFL*, however, the Court suggested that the distinction between contributions and expenditures on behalf of candidates does not apply with respect to spending by business corporations. The Court stated, "Direct corporate *spending* on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace." [19]

The unique structure and purposes of business corporations give rise to compelling justifications for regulation of independent expenditures which simply do not arise when individuals or other types of entities are involved.[20] Corporate treasury money creates an "unfair advantage in the political marketplace," [21] whether

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associations may also present problems. *See MCFL*, 479 U.S. at 258 n.11 ("While business corporations may not represent the only organizations that pose this danger, they are by far the most prominent example of entities that enjoy legal advantages enhancing their ability to accumulate wealth."). The Court of Appeals did not reach the Chamber's contention that the asymmetry in the treatment of corporations and unions under the Michigan statute violates the equal protection clause. Accordingly, this issue should not be addressed by the Court.

[18] *NCPAC*, 470 U.S. at 497; *Buckley*, 424 U.S. at 47. This dichotomy rests on the Court's understanding that, in the absence of prearrangement or coordination of the expenditure with the candidate, the government interest in regulating spending to prevent corruption is greatly reduced. *Id.* at 47.

[19] *MCFL*, 479 U.S. at 257 (emphasis added).

[20] As this Court has observed, the "differing structures and purposes of different entities may require different forms of regulation in order to protect the integrity of the electoral process." *California Medical Ass'n*, 453 U.S. at 201.

[21] *MCFL*, 479 U.S. at 257.

the corporate money is contributed to a candidate or spent independently to advocate the election or defeat of that candidate. In addition, both uses of corporate funds equally implicate the strong governmental interest in "prevent[ing] an organization from using an individual's money for purposes that the individual may not support." [22]

Furthermore, in contrast to independent expenditure limitations applied to political committees, regulation of corporate independent expenditures does not interfere with the First Amendment right of free association. Business corporations, established for economic purposes, are not "mechanism[s] by which large numbers of individuals of modest means can join together . . ." in organizations that "amplify the voice of [their] adherents" for purposes of political expression.[23] Indeed, by protecting investors against compelled political speech, regulation of corporate electoral activity advances principles of free association.[24]

Moreover, ample alternative means of expression and political participation are available for corporations, including trade associations, that are barred from spending treasury money in election campaigns.[25] Such corporations may establish PACs and may pay for their administrative and fundraising expenses.[26] Using funds

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[22] *Id.* at 260.

[23] *Cf. NCPAC*, 470 U.S. at 494 (citing *Buckley*, 424 U.S. at 22); *NAACP v. Alabama*, 357 U.S. 449, 460 (1958); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295-96 (1981).

[24] *See Abood v. Detroit Board of Education*, 431 U.S. 209, 234-35 (1977).

[25] *See Ward v. Rock Against Racism*, No. 88-226, slip op. at 19-20 (U.S. June 22, 1989).

[26] J.A. 136a-138a (testimony of E. James Barrett, president of Michigan State Chamber of Commerce). The Michigan Chamber may make unlimited expenditures of its treasury funds to solicit the directors, officers, and shareholders of all of its members. J.A. 138a. The Chamber's PAC has been highly successful. J.A. 161a-

obtained through voluntary contributions by affiliated individuals, PACs are allowed to make independent expenditures and contribute directly to candidates.[27]

Corporations and trade associations also have an unlimited right to speak out on any issue, through advertisements or in any other manner they choose, provided that they do not expressly advocate the election or defeat of specific candidates. They can spend an unlimited amount to support or oppose issue referenda.[28] They can lobby the legislative and executive branches of government.[29] They can endorse candidates in communications to their shareholders, members, and employees, and urge these individuals to contribute to those candidates.[30] Furthermore, the directors, officers, shareholders and employees of corporations are free to participate in elections as individuals and through unincorporated entities. In sum, a prohibition on independent expenditures by corporations serves compelling government interests while leaving open ample means of political expression.

163a (testimony of Robert S. LaBrant, administrator of the Chamber's PAC). Moreover, the Michigan Chamber has held seminars and prepared a "Mini PAC Kit" as part of an active program to encourage Michigan businesses and trade associations to set up their own PACs, and in part as a result of this effort, the number of such PACs in Michigan has increased seven-fold since 1976. J.A. 157a-161a (LaBrant testimony).

[27] The Chamber's complaint in this case was founded on its inability to publish a particular advertisement in support of a candidate. As a Chamber official acknowledged, the Chamber's PAC could have paid for precisely the same ad, but chose not to do so because it deemed the ad unnecessary to the success of the candidate. J.A. 166a-167a (LaBrant testimony).

[28] J.A. 145a-146a (Barrett testimony); *see Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981); *Bellotti*, 435 U.S. 765 (1978).

[29] J.A. 146a (Barrett testimony); *id.* at 148a-149a (LaBrant testimony).

[30] J.A. 146a (Barrett testimony); *see NRWC*, 459 U.S. 197 (1982).

B. The Chamber of Commerce Is Fundamentally Different From an Ideological Advocacy Organization.

MCFL reaffirmed the legitimacy of expenditure prohibitions as applied to corporations in general, but distinguished a narrowly circumscribed category of nonprofit corporations that pose no "threat of the danger that has prompted regulation."[31] Notwithstanding their corporate form, these ideological corporations differ fundamentally from " 'traditional corporation[s] organized for economic gain' . . . that [have] been the focus of regulation of corporate political activity."[32] Three characteristics of MCFL were "essential" to the Court's holding that it could not constitutionally be prohibited from making campaign expenditures:[33]

> *First*, it was formed for the express purpose of promoting political ideas, and cannot engage in business activities . . . This ensures that *political resources reflect political support*.
>
> *Second*, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. This ensures that *persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity.*
>
> *Third*, [it] was *not established by a business corporation or labor union, and it is its policy not to accept contributions from such entities.* This prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace.[34]

All of these criteria must be satisfied before a nonprofit corporation falls within the *MCFL* exception; the Michigan State Chamber of Commerce satisfies none.

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[31] *MCFL*, 479 U.S. at 263.

[32] *Id.* at 259 (quoting *NCPAC*, 470 U.S. at 500).

[33] *MCFL*, 479 U.S. at 263-264.

[34] *Id.* at 264 (emphasis added).

In defining the category of ideological nonprofit corporations, the Court found it essential that "MCFL was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities." [35]

In contrast, the Chamber was established by business corporations to promote their economic interests. The Chamber depends heavily on contributions from such entities, which constitute at least 75 percent of its dues-paying members.[36] Thus, the Chamber is a conduit for precisely the type of direct spending that, as the Court has found, threatens the integrity of the electoral process. For this reason alone, the Chamber has no constitutionally protected right to make independent expenditures in political campaigns.

This Court also emphasized that MCFL "was formed for the express purpose of promoting political ideas, and [could] not engage in business activities." [37] Consequently, MCFL's contributors were "fully aware of its political purposes, and in fact contribute[d] precisely because they support[ed] those purposes." [38] Campaign spending by such an organization reflects its political support rather than its business success.[39]

Unlike MCFL, however, the Chamber was not founded for the sole purpose of engaging in political advocacy. One of the Chamber's own publications acknowledges that some of its members believe the Chamber is a "non-

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[35] *Id.*

[36] J.A. 135a (Barrett testimony).

[37] *MCFL*, 479 U.S. at 264.

[38] *Id.* at 260-261.

[39] *Id.*

political organization." [40] Indeed, the Chamber performs numerous functions unrelated to politics. For example, the Chamber provides services to its members including group insurance, a business hotline, a directory of members, regular and special publications, legislative briefings and seminars.[41] To the extent that members join the Chamber to obtain these services and do not desire the use of dues money for campaign expenditures, they cannot be said to authorize the use of their funds for electoral purposes.[42] Thus, the money the Chamber wishes to spend for political advocacy in candidate campaigns partly reflects the Chamber's success in an economic or quasi-

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[40] In a publication describing its political action committee, the Chamber states:

> Chambers and politics . . . more than a decade ago this subject would have been taboo at a Chamber of Commerce meeting. Several generations of Chamber executives had been conditioned to view politics as something akin to leprosy—no surer way to lose a Chamber's tax-exempt status, not to mention harm it's dues income. Chamber executives and members alike felt the Chamber of Commerce was a non-political organization.
>
> That attitude has faded, but is not completely dead.

Michigan State Chamber of Commerce, *The State/Local Chambers of Michigan Working Together in Political Action* 1 (1985); *see* J.A. 79a-84a (use of document at trial). This passage suggests that the Chamber's membership has never reached a consensus as to the desirability of advocacy on behalf of candidates.

[41] *See, e.g.*, Michigan State Chamber of Commerce, *1985-86 Michigan Directory* 1 (1985), J.A. 42a; *see* By-Laws of the Michigan State Chamber of Commerce, J.A. 43a-44a.

[42] *Cf. MCFL*, 479 U.S. at 260. The Chamber has established a political action committee (PAC) that solicits funds separately from individual members and shareholders and officers of corporate members. *See* J.A. 125a-126a (Barrett testimony). A Chamber member could reasonably believe that contributions to the Chamber's PAC are used for electoral spending, but that dues are used only for other purposes. Moreover, given the diversity of the Chamber's membership and the non-political incentives for joining, there is a strong likelihood that some members may be opposed to candidates whom the Chamber's leadership chooses to support.

economic marketplace rather than in the marketplace of political ideas.[43]

In addition, the Court stressed that contributors to MCFL did not face any economic disincentive to withdrawal from the organization if they disagreed with its political activities.[44] Dissenting members had the "readily available remedy" of withholding future contributions.[45] This Court recognized, in contrast, that no such remedy exists with respect to business corporations, whose shareholders or members would suffer economically by withdrawing their support.[46]

Unlike MCFL, but like profit-making corporations, the Chamber has members who may face economic disincentives that would discourage them from withdrawing for political reasons. For example, a small business might lose its ability to obtain group insurance, to participate in education or training programs, to receive information on legislative and regulatory developments, or to include its listing in the Chamber's directory. To protect such members from the unfair choice between their economic well being and their right not to support candidates against their will, the Chamber should be excluded from the small

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[43] *Cf. MCFL*, 479 U.S. at 259. Larger members pay higher dues, providing another link between economic success and the Chamber's revenues. *See* J.A. 46a.

[44] *MCFL*, 479 U.S. at 262, 264 ("given a contributor's awareness of the political activity of the respondent, as well as the readily available remedy of refusing further donations, the interest in protecting contributors is simply insufficient to support § 441b's restriction on the independent spending of MCFL.").

[45] *Id.* at 262.

[46] *Id.* at 260 ("because such individuals depend on the organization for income or for a job, it is not enough to tell them that any unhappiness with the use of their money can be redressed simply by leaving the corporation or the union."); *NWRC*, 459 U.S. at 208; *see also Pipefitters*, 407 U.S. at 414-15.

class of ideological corporations that may make expenditures in election campaigns.

In sum, the Chamber differs in all material respects from the paradigmatic ideological nonprofit corporation described in *MCFL* and exemplified by MCFL itself. Yet the Sixth Circuit erroneously concluded that the Chamber, like MCFL, may not constitutionally be prohibited from making campaign expenditures.

II. CAMPAIGN SPENDING BY CHAMBERS OF COMMERCE AND TRADE ASSOCIATIONS WOULD DRASTICALLY UNDERMINE PROHIBITIONS ON DIRECT CAMPAIGN SPENDING BY BUSINESS CORPORATIONS.

Most, if not all, trade associations and chambers of commerce [47] possess the same characteristics that the Sixth Circuit deemed sufficient to justify an exemption from legislative prohibitions on campaign spending.[48] Under the decision below, therefore, virtually the entire incorporated trade association sector could assert a constitutional right to make campaign expenditures. As a result, vast amounts of business corporation money would flow through conduits into the electoral process, even though such corporate spending may constitutionally be prohibited.

Purporting to apply the first criterion in *MCFL*, the Court of Appeals declared that the Chamber "exists for purely ideological purposes." [49] If that application of

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[47] The total number of U.S. trade associations, their local chapters, and independent local or regional groups is approximately 40,000. *National Trade and Professional Associations of the United States* 7 (J. Russell 24th ed. 1989).

[48] J.S. App. 22a-28a, 856 F.2d at 789-90.

[49] J.S. App. 27a, 856 F.2d at 790. The Court recognized, however, that the Chamber performs various services for its members. *See* J.S. App. 3a, 20a, 22a, 856 F.2d at 784, 788, 789.

MCFL is correct, then all trade associations could be so characterized. In its multiple objectives and purposes, the Chamber is typical of trade associations and business leagues. Such organizations normally perform a variety of mutual assistance functions and lobby for their members' business interests. Yet, like the Chamber, virtually any incorporated trade association could describe its activities in political or ideological terms. For example, the "objects and purposes" of the National Association of Manufacturers include the "dissemination of information with respect to the principles of individual liberty and ownership of property," as well as the establishment of "a mutual and cooperative organization of American manufacturers for the fostering of their trade, business and financial interests." [50] Indeed, it is difficult to imagine any policy which a lobbying group working to promote the economic interests of business corporations could not support or oppose with ideological or political arguments.[51]

The Court of Appeals concluded that the Chamber satisfied *MCFL*'s second criterion because members pay annual dues and do not have a claim on the Chamber's earnings. Consequently, the Court of Appeals asserted,

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[50] *Constitution of the National Association of Manufacturers of the United States of America*, art. II, § 1 (rev. 1985); *see* U.S. Chamber of Commerce, *We Believe in America and the Free Enterprise System That Made It Great* 2, 3, 12 (1984); *id.* at 2 ("If your firm is to meet the challenge of those who would handcuff free enterprise and claim more and more of your hard-earned profits, you need an ally that will fight business' fight as only the U.S. Chamber of Commerce can."); Edison Electric Institute, *1987-1988 Annual Report* 2 (mission statement of trade association of privately-owned electric utilities).

[51] Privately-owned electric utilities espouse the virtues of free enterprise; oil producers urge various measures that would increase the nation's energy independence while increasing the price of domestically produced oil; publishers and broadcasters have an interest in promoting freedom of speech; defense contractors' groups assert that national security requires increased defense spending.

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members are "not akin to minority shareholders of a 'traditional' corporation who do not support the same candidates supported by the corporation's independent political expenditures." [52] Again, under this reasoning, most trade associations would fit within this criterion because they are organized on a nonprofit basis and collect dues from their members.[53]

With respect to the third *MCFL* criterion, the Court of Appeals found that the Chamber was "not a subcorporation established by a parent corporation," and accordingly was "not established by a business corporation." [54] The same reasoning would apply generally to incorporated trade associations, which are created and supported not by a single corporation but by a number of member businesses.[55]

In sum, under the Sixth Circuit's misapplication of the three *MCFL* criteria, virtually all trade associations or business leagues would qualify for the *MCFL* exception.

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[52] J.S. App. 24a, 856 F.2d at 789.

[53] *National Trade and Professional Associations of the United States*, *supra note* 47, at 7. Section 501(c)(6) of the Internal Revenue Code provides tax-exempt status for "business leagues" and trade associations only if they are "not organized for profit and no part of [their] net earnings . . . inures to the benefit of any private shareholder or individual." 26 U.S.C. § 501(c)(6) (1982); *see* R. Statham & R. Buek, *Associations and the Tax Laws* 5-11 (1978); Kates & Zimmerman, *The Tax-Exempt Business League and Its Functions*, 8 B.C. Ind. & Comm. L. Rev. 953, 954 (1966-67).

[54] J.S. App. 24a-25a, 856 F.2d at 789.

[55] *National Trade and Professional Associations of the United States*, *supra* note 47, at 7. The Court of Appeals also asserted that the Chamber was not a conduit for business corporate spending because it believed that Michigan law required the Chamber to disclose the sources of funds used for independent expenditures. As appellants demonstrated in the Jurisdictional Statement, this assumption was based on a mistaken interpretation of Michigan law. J.S. 22-23.

By holding that the Chamber is entitled to the same constitutional protection as MCFL, the Sixth Circuit has opened a potentially massive loophole for business corporate political spending. Every geographic area and every industry has one or more trade associations, which are typically nonprofit corporations with corporate members. The trade association sector has enormous financial resources,[56] augmented by the resources of its member corporations. If the Sixth Circuit's decision is upheld, business corporations would be virtually certain to increase the amounts of corporate money expended through trade association conduits for campaign purposes.[57]

Currently, business corporations and incorporated trade associations must create separate segregated funds (PACs) to participate in election campaigns at the federal level and in states that prohibit direct corporate involvement. PAC fundraising activities are subject to substantial restrictions,[58] which this Court unanimously sustained

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[56] The Michigan State Chamber of Commerce had dues income of $1.85 million in 1984-85. The organization members of the United States Chamber of Commerce include 1,100 trade and professional associations and 2,800 chambers of commerce. U.S. Chamber of Commerce, *1989 Annual Report* 3.

At least 750 trade associations with annual budgets exceeding $1 million have corporate members whose interests may be affected by governmental policies; of these, more than 200 have annual budgets exceeding $5 million. Analysis of lists published in *National Trade and Professional Associations of the United States, supra* note 47, at 411-15. The Edison Electric Institute alone had $32.1 million in income from membership dues during 1987. Edison Electric Institute, *1987-1988 Annual Report, supra* note 50, at 22.

[57] Trade associations and business leagues, exempted from federal income tax under 26 U.S.C. § 501(c)(6), are not required to refrain from political activity in order to preserve their tax-exempt status. *See* T. Geer, *Tax Management, Estates, Gifts, and Trusts: Exempt Organizations—Exemption Requirements* A-15 (1986).

[58] Under federal law, a corporation or incorporated trade association may pay the administrative and fundraising expenses of its

in *NWRC*.[59] In contrast, these restrictions would not apply to business corporation spending through intermediary nonprofit corporations. Such spending would be certain to increase dramatically.

The extensive financial activity by corporate and trade association PACs today gives proof of the enormous interest of business corporations in influencing the political process. Approximately two thousand business corporations and hundreds of trade associations have established affiliated PACs at the federal level.[60] In the 1987-88 election cycle, according to Federal Election Commission records, corporate PACs disbursed more than $89 million, including $56 million in contributions to candidates.[61]

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affiliated PAC, 2 U.S.C. § 441b(b)(2)(C) (1982), but the PAC may solicit contributions only from a restricted class of individuals. A PAC sponsored by a corporation may solicit the stockholders and executive personnel of its parent corporation. *Id.* § 441b(b)(4)(A)(i). The PAC of a trade association may solicit the stockholders and executive or administrative personnel of any member corporation that has approved such solicitation, but a corporation may authorize solicitation by only one trade association per year. *Id.* § 441b(b)(4)(D). Individual contributions to a PAC are limited to $5000 per year. *Id.* § 441a(a)(1)(C).

Michigan law also restricts fundraising solicitations by corporate PACs. It allows a PAC sponsored by a nonprofit corporation to solicit contributions only from individual members and from stockholders, officers, directors, or managerial personnel of corporate members. Mich. Comp. Laws § 169.255 (West Supp. 1988), J.S. App. 107a-108a. Unlike the federal statute, it does not restrict the frequency with which such solicitations may be made. J.A. 137a-138a (Barrett testimony).

[59] These restrictions are designed to protect the political process from the distorting effects of corporate wealth and to assure that contributions are genuinely voluntary. *NRWC*, 459 U.S. at 208.

[60] Federal Election Commission, Press Release, April 9, 1989, at 2. In Michigan alone, more than 200 PACs have been established by corporations, trade and professional associations, and local chambers of commerce to operate in state politics. J.A. 158a.

[61] Federal Election Commission, Press Release, April 9, 1989, at 3.

FEC statistics also show that the largest trade association PACs deployed substantial sums of money. For example, the Realtors Political Action Committee made disbursements of $5.9 million during the 1987-88 election cycle.[62] If incorporated trade associations are permitted to spend dues money in election campaigns, this means of political influence can be expected to attract much larger sums than PACs from corporate treasuries amassed for business purposes.

III. TO PROTECT THE INTEGRITY OF THE ELECTORAL PROCESS, THE *MCFL* EXCEPTION MUST CONTINUE TO APPLY ONLY TO NONPROFIT CORPORATIONS THAT DO NOT RECEIVE FUNDS FROM BUSINESS CORPORATIONS.

Unless this Court reaffirms the circumscribed boundaries of the exception fashioned in *MCFL*, Congress and state legislatures will be powerless to protect the electoral process from an influx of business corporation funds through incorporated nonprofit conduits. A prohibition on campaign expenditures by incorporated trade associations and chambers of commerce would not suffice. Every nonprofit corporation that accepts money from business corporations must be prohibited from making campaign expenditures. The Court should adhere to that bright-line rule for two reasons. First, it is economic nonsense to say that nonprofit corporations can, in any meaningful sense, segregate funds received from business corporations. Second, any other rule would require the courts to decide fundamentally unanswerable questions of degree and would invite circumvention by business corporations.

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[62] Build Political Action Committee, sponsored by the National Association of Home Builders, and Dealers Election Action Committee, sponsored by the National Automobile Dealers Association, each spent $1.7 million; the American Bankers Association's BankPac spent $1.36 million. *Id.* at 27.

Requiring a nonprofit corporation to separate its business corporation contributions from its other funds would not effectively prevent the corporate contributions from harming the political process. Money is fungible.[63] When an organization engages in multiple activities, money from one source that is used for one activity frees up money from other sources to be used for other activities. If, for example, a nonprofit corporation spends $5000 donated by a business corporation for educational purposes, it can use $5000 from other sources that would otherwise have been spent on educational programs for campaign-related expenditures. By funneling corporate wealth into the political process through a conduit, the business corporation causes the same two harms that this Court has recognized in the context of direct expenditures by business corporations.[64]

This Court has recognized the "substitution effect" resulting from the fungibility of money in the context of union funds. In *Retail Clerks v. Schermerhorn*,[65] a union was engaged in both collective bargaining and other non-collective bargaining activities. The Court rejected the

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[63] *See* D. McCloskey, *The Applied Theory of Price* 8-9 (1982) (example of mother giving child $500 for something he would purchase in any event; explaining futility of distinguishing between purchases with mother's money and purchases with money from other sources; child is simply $500 richer).

[64] *See supra* Part I.A. If the nonprofit corporation spends less than $5000 from all sources on campaign expenditures, then the effect of the business corporation's donation on the political process will be less than dollar for dollar. However, as long as the nonprofit corporation spends any amount on campaign expenditures, there is no economically meaningful way to assure that the political expenditures were not made with the business corporation's money. Even if the nonprofit corporation segregates its funds in form, claiming to use its money from business corporations solely for its nonpolitical activities, the practical consequences will be no different because of the substitution effect.

[65] 373 U.S. 746, 753-54 (1963).

union's argument that fees paid by nonmembers were used solely to pay the costs of collective bargaining, and that the union's other activities were supported solely by members' dues. "[E]ven if all collections from nonmembers must be directly committed to paying bargaining costs," the Court explained, "*this fact is of bookkeeping significance only rather than a matter of real substance.*" [66] As the Court recognized,

> If the union's total budget is divided between collective bargaining and institutional expenses and if nonmember payments, equal to those of a member, go entirely for collective bargaining costs, the nonmember will pay more of these expenses than his pro rata share . . . . By paying a larger share of collective bargaining costs the nonmember subsidizes the union's institutional activities.[67]

The substitution effect was also recognized in *Abood v. Detroit Board of Education.*[68] In that case, the Court held that a dissenting employee is constitutionally entitled to refrain from paying the proportion of union charges or assessments corresponding to the proportion of aggregate income that the union spends for political purposes. The union's use of dissenting employees' payments for political purposes would not adequately protect the rights of the dissenters.[69]

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[66] *Id.* at 753 (emphasis added).

[67] *Id.* at 754.

[68] 431 U.S. at 240-41.

[69] *Id.* at 237 n.35 (quoting *Retail Clerks v. Schermerhorn,* 373 U.S. at 753-54). Subsequently, this Court held that it is not constitutionally permissible to collect the full amount and then to refund an appropriate proportion to a nonmember employee, for even the temporary use of these funds for political purposes is forbidden. *Chicago Teachers Union v. Hudson,* 475 U.S. 292, 305-06 (1986).

This Court also recognized the substitution effect in *Regan v. Taxation With Representation of Washington,* 461 U.S. 540, 541, 543-44 & n.6 (1983), which dealt with the Internal Revenue Code provisions that prohibit the use of tax-deductible contributions for political activities. A nonprofit corporation challenged the requirement that it conduct its lobbying activities through a separate organization in order to retain 501(c)(3) tax-exempt status for its publishing and litigation activities. The Court rejected the First Amendment challenge. It was not sufficient, in order to prevent the use of tax-deductible contributions to subsidize lobbying, to require simply that the nonprofit corporation spend its tax-deductible contributions to finance activities other than lobbying.

The commingling problem is equally applicable in the present context. A nonprofit corporation cannot meaningfully segregate funds from prohibited corporate sources and funds from permissible sources, using only the latter for campaign expenditures. Every corporate dollar spent on nonpolitical activities frees up a dollar for political purposes. Indeed, the only way to assure that business corporation funds do not improperly influence the electoral process is to prohibit nonprofit corporations that accept such funds from making any expenditures in connection with election campaigns. This is the sound rule established by *MCFL.*

No less restrictive alternative would effectively protect the integrity of the political process.[70] Requiring nonprofit corporations to disclose their contributors would not protect against the harms that accompany indirect political expenditures by profit-making corporations. Ag-

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[70] *See Wayte v. United States,* 470 U.S. 598, 610 (1985) (quoting *United States v. O'Brien,* 391 U.S. 367, 377 (1968)) (government regulation of speech is sufficiently justified where certain conditions are met, one of which is that the restriction is no greater than necessary); *City Council v. Taxpayers for Vincent,* 466 U.S. 789, 804-05 (1984) (same); *Posadas de Puerto Rico Ass'n v. Tourism Co. of Puerto Rico,* 478 U.S. 328, 340 (1986) (commercial speech may be restricted where restrictions are no more extensive than necessary to serve a substantial government interest); *Roberts v. United States Jaycees,* 468 U.S. 609, 623 (1984) (infringement on right to associate for expressive purposes might be justified where compelling state interests cannot be achieved through significantly less restrictive means).

gregated corporate wealth would still be deployed unfairly in the political arena, and the rights of dissenting shareholders would still be violated.

Similarly, prohibiting independent campaign expenditures by some subcategory of those nonprofit corporations that accept funds from business corporations would not solve the problem. Whenever such nonprofit corporations spend money to support or oppose candidates, the expenditure harms the political process and the dissenting shareholders of the original business corporation donors.[71] To be sure, campaign spending by nonprofit corporations receiving a substantial portion of their money from business corporations may cause these harms to a greater degree than spending by an entity primarily supported by non-business sources. Nevertheless, any attempt to draw a line, short of an absolute prohibition on the indirect use of corporate money, would fail to remedy some of the problem and would invite circumvention of the basic prohibition on corporate spending.

In addition, line-drawing efforts would force the executive branch and the courts to grapple with difficult questions of degree. No workable distinction can be drawn between primarily ideological entities that receive money from business corporations, and those that are primarily designed to promote business interests. First Amendment values dictate that courts should not attempt to determine whether an association is "genuinely ideological."[72] In

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[71] These injuries occur even if business corporations exercise no influence or control over the nonprofit entity, even if such corporations provide a small proportion of the nonprofit organization's total income, and even if the nonprofit corporation qualifies for tax-exempt status as a charitable or civic organization.

[72] *Cf. United States v. Ballard*, 322 U.S. 78, 86, 87 (1944) (impermissibility of judging truth or falsity or sincerity of religious beliefs).

contrast, the bright-line rule established in *MCFL* provides the only administrable standards of conduct.[73]

In *FEC v. National Right to Work Committee*, this Court recognized that it should not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared."[74] A legislature may constitutionally enact a prophylactic rule directed at a potential harm even if it applies to entities which have not yet actually exhibited, or are less likely to exhibit, the harm the legislature attempts to eradicate.[75]

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[73] To be sure, *MCFL* created an exception to the statutory bright-line rule at issue—a ban on independent expenditures by *all* corporations. The Court found that political spending by MCFL presented *none* of the harms caused by such spending by business corporations; thus, the distinction between MCFL and more traditional business corporations was a difference in kind, not merely in degree. But both the majority and dissent agreed that this Court "should not second-guess a decision to sweep within a broad prohibition activities that differ in degree, but not in kind." 479 U.S. at 263; *id.* at 268 (Rehnquist, J., dissenting). There are only differences in degree, not in kind, among nonprofit corporations that receive funds from business corporations and also seek to make expenditures in election campaigns. *Cf. Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293-99 (1984) (declining to second-guess Park Service's decision to ban all sleeping in Lafayette Park, including sleeping as a mode of expressive conduct, rather than to limit the number of such demonstrations in order to protect the park).

[74] *NRWC*, 459 U.S. at 210. *See Buckley*, 424 U.S. at 83 ($10 recordkeeping threshold and $100 reporting threshold are constitutional because the "line is necessarily a judgmental decision, best left in the context of this complex legislation to congressional discretion"); *cf. Rosario v. Rockefeller*, 410 U.S. 752, 760-61 (1973) (not unconstitutionally arbitrary to impose voter registration deadline several months before election to avoid disruptive "party raiding" in primary elections, even though many citizens seeking to register after the deadline will not possess such impermissible motives).

[75] *See NCPAC*, 470 U.S. at 500 (1985) (constitutional to prohibit contributions by membership corporations even though they

When a perceived evil is powerful enough to jeopardize the integrity of the democratic political process, the legislature should be permitted to enact laws designed not only to remove the direct harm but also to foreclose all probable avenues of circumvention.[76]

Congress decided to take this step more than forty years ago. In 1947, it prohibited independent expenditures in federal election campaigns by trade associations, chambers of commerce, and other corporations receiving money from business corporations. During floor debate, Senator Barkley noted that members of the United States Chamber of Commerce and the National Association of Manufacturers "do not contribute their funds to these organizations primarily for political purposes." He asked Senator Taft, the sponsor of the legislation, if such an organization would be prohibited, "out of funds contributed by corporations into the general fund of the associa-

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"might not exhibit all of the evil that contributions by traditional economically organized corporation[s] exhibit"); *NRWC*, 459 U.S. at 210 ("[w]hile § 441b restricts the solicitation of corporations and labor unions without great financial resources, as well as those more fortunately situated, we accept Congress' judgment that it is the potential for such influence that demands regulation"); *Buckley*, 424 U.S. at 70-71 (FECA disclosure requirements are constitutional as applied to minor parties, despite diminished governmental interests in disclosure); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 101 (1947) (constitutional to ban political activity by all types of classified federal employees, even though "the impartiality of many of these is a matter of complete indifference to the effective performance" of their duties); *cf. War[illegible] v. Rock Against Racism*, No. 88-226, slip op. at 14-17 (U.S. June 22, 1989) (regulation of time, place, or manner of protected speech need not be the least restrictive means of doing so; regulation is constitutionally valid if it is not substantially broader than necessary).

[76] *Cf. California Medical Ass'n v. FEC*, 453 U.S. at 198 (Congress can limit contributions to multi-candidate political committees to prevent circumvention of contribution limits to candidates).

tion, from buying newspaper space to advocate or oppose a candidate for public office. . . ." Senator Taft responded, "Of course, if the Chamber of Commerce were a corporation, as I think it is, it would be clearly illegal."[77] Michigan's legislature has made the same considered policy choice. On the basis of its decision in *MCFL*, this Court should uphold the constitutionality of the Michigan statute.

CONCLUSION

For these reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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June 29, 1989

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[77] 93 Cong. Rec. 6438 (1947).

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